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April 28, 2006

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Re: Proposed House Bill No. 5851

Dear Tort Reform Committee Members:

Thank you very much for providing our office the opportunity to comment on House Bill No. 5851. It was a pleasure listening to the comments from the various speakers on April 25, 2006 at the committee hearing.

General Background

As you may be aware, my name is Mark A. Wisniewski. I am the Mass Tort/Asbestos Department Chair at the Kitch Law firm. Although our office is known as a medical malpractice defense firm, we have been involved in asbestos litigation in Michigan and across the country for over 25 years. Our office has served as national counsel for one of the biggest pipe-covering and block manufacturers in the nation as well as local counsel for manufacturers, premises owners and suppliers.

Over the last 16 years, I have dedicated the majority of my time to asbestos litigation in Michigan and across the country. I represent a wide variety of clients involved in both the defense of asbestos personal injury and property damage claims. I have had the pleasure of being trial counsel on numerous cases throughout this State and in other states.

For approximately the last 10 years, I have served as a defense member of the Wayne County Steering Committee. The November 21, 2003 Case Management Order that created this committee states in Section II.B.(1), "A steering committee shall be formed for the purpose of meeting with and advising the Court on matters and issues, the resolution of which will promote justice to all parties." This Committee consists of 3 plaintiff representatives (James J. Bedortha, Margaret Holman-Jensen and Michael B. Serling) and 8 defense representatives (Dale Burmeister, Neil MacCallum, Timothy Batton, Steven Hickey, Lisa Robinson, Michael Vartanian, James Stuart and myself).

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Part of my role on the committee is to meet with both plaintiff and defense representatives to prepare the discovery and trial schedule for the Court.

National Asbestos Crisis

As former Detroit Mayor Dennis Archer testified, House Bill No. 5851 is very similar to the proposed medical criteria bill which the ABA presented to the U.S. House of Representatives and U.S. Senate. The ABA medical criteria bill's purpose was to address the growing number of asbestos cases that were being filed with questionable medical evidence. Defendants asserted that the removal of these questionable cases would reduce defendants' transactional costs and free-up needed funds to resolve legitimate claims. Without the reduction in transactional costs, defendants would certainly have to address whether bankruptcy was the only solution to their asbestos problem. Unfortunately, it is unclear if or when the medical criteria bill will reach the floor of the U.S. House or U.S. Senate.

As you are aware, many states other than Michigan struggle with the asbestos crisis. The committee has heard testimony regarding the voluminous dockets in Texas and Ohio. Pitfalls contributing to an asbestos crisis in these states include: punitive damage awards, unregulated non-economic awards, venue shopping, bankruptcy laws that allow for companies to escape liability, joint and several liability laws and questionable medical and industrial hygiene expert testimony. Fortunately, Michigan has already enacted legislation eliminating these pitfalls.

Michigan: The Fair and Just State

As a credit to our State Legislature, Michigan has laws that are fair and just to victims as well as companies. These laws address three of the pitfalls: (1) Venue, (2) Several Liability and (3) Caps on Non-economic damages. These legislative enactments have ensured that Michigan does not contribute to the national asbestos crisis.

Venue

Michigan law requires that a plaintiff actually be harmed in Michigan in order to file a claim in Michigan state court. For example, if a plaintiff is exposed to asbestos at Ford Rouge in Dearborn, Michigan, the only place in Michigan where the case can be filed is Wayne County. Similarly, if a plaintiff's sole exposure occurred at Dow Chemical, the only place the case can be filed is Midland County. Likewise, if a plaintiff's only exposure is at General Motors Grey Iron Foundry, the only place the case can be filed is Saginaw County.

In other states such as Texas, California or Illinois, a plaintiff can file a claim in that state solely if one of the defendants conducts business in that state or if one of the defendants corporate headquarters is in that State. Over the last five years, I have represented companies in numerous depositions regarding cases where the plaintiff

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presently lives in Michigan and was only exposed to asbestos in Michigan yet who have filed their cases in Texas, California or Illinois.

Several Liability

Unlike other states which have joint and several liability, Michigan is a several liability state. Several liability only requires that a defendant pay its fair share of a verdict. In principle, this means that if there are 100 defendants in the case and the jury concluded that the plaintiff was exposed to a product from each of the 100 defendants; an individual defendant may only be required to pay 1% of the total verdict provided that the jury concluded that each defendant was equally at fault. For instance, in the only asbestos several liability case tried to verdict in Michigan, a Wayne County jury concluded that the defendant was 80% at fault and that a non-party premises owner was 20% at fault. In this case, the defendant only had to pay 80% of the verdict. Under joint and several liability, as is found in other states, this defendant would have had to pay 100% of the verdict.

Caps on Non-economic Damages

Prior to the 1996 Tort Reform Act, Michigan did not have any caps on non-economic damages. It was not uncommon to see \$1,000,000.00 verdicts in cases with very limited economic damages. The 1996 Tort Reform Act placed a cap on non-economic damages of \$280,000.00 and \$500,000.00; adjusted annually. (MCL 600.2946a(1)) This portion of the Act protects defendants from damage awards that are inconsistent with the alleged harm. Although there continues to be debate regarding the fairness of caps on damages, the Act does protect the plaintiff by allowing for the waiver of the cap if a jury concludes that the defendants actions rose to the level of gross negligence. (MCL 600.2046a(3)) The present "high" cap as of January 2006 is \$683,500.00.

House Bill 5851/Medical Criteria

Let me begin by stating that applying medical criteria in asbestos cases in Michigan is nothing new. To illustrate this point, I found a letter from 1994 to a plaintiff's attorney discussing medical criteria. At that time, the plaintiff attorney had approximately 200 cases in Wayne County. Of the 200 cases, approximately 40 cases had minimal symptoms of asbestosis. Both parties faced the problem of how to address these 40 cases. Our solution to the dilemma at that time was to develop agreed upon medical criteria. Both parties agreed to dismiss the 40 cases without prejudice. Plaintiffs were given the opportunity to re-file the cases if the plaintiffs met certain medical criteria. Defendant also agreed to waive any statute of limitation defenses once the case was re-filed. The agreed upon medical criteria at that time was a combination of an ILO B-Reading result and a pulmonary function test result. We agreed to an ILO chest reading of 1/0 with a FVC < 80% and a FEV1/FVC > 75% or a TLC < 80%. Alternately, if the plaintiff had an ILO chest reading of 1/1 or greater than the FEV1/FVC only had to be > 72%.

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In approximately 1997, our office filed a motion requesting that a medical criteria/in-active docket be implemented in Wayne County Circuit Court. Unfortunately, no defendants joined this motion. Oral arguments were heard before the Honorable Robert J. Colombo, Jr. After the hearing, Judge Colombo denied our motion on the grounds that he believed that the creation of an in-active was a legislative and not a judicial action.

In 2003, the Michigan Supreme Court looked at the issue of medical criteria and an in-active docket as part of Administrative Order 2003-47. This issue is still before the Michigan Supreme Court and has recently re-surfaced. The Michigan Supreme Court is presently looking at two separate medical criteria models that would consolidate all cases for discovery purposes in Wayne County before Judge Robert J. Colombo, Jr. Under both proposed models, if the cases were not resolved before trial, the cases would return to the proper Michigan County for trial.

Evaluation of Asbestosis Cases

For the last 25 years, our office has used medical criteria as we evaluate each and every case. On behalf of our clients, we evaluate four factors: (1) plaintiff's occupation, (2) plaintiff's testimony as it relates to our clients' asbestos-containing products, (3) plaintiff's medical condition and (4) potential damages.

In assessing plaintiff's medical condition, each client that our office represents follows certain medical criteria. Some of our clients will not pay on a claim unless they have an ILO B-reading of 1/1 or greater. Others will pay on 1/0 or greater cases. Yet other clients put more emphasis on pulmonary function test results than on the ILO B-reading. In those cases, a client will not allocate settlement dollars to a plaintiff without a FVC below 80%. Others will pay if the FVC is below 90%. Still other clients look at characteristics such as plaintiff's smoking history, past medical history and age. As you can imagine, each case can have many different medical factors that are part of the final evaluation. All of these medical criteria are evaluated in conjunction with product exposure and occupation to determine if a settlement value should be placed on a particular case. Sometimes that settlement value is zero.

Raising the Cap on Non-Economic Damages: An Unintended Consequence

House Bill 5851, Section 3011, creates a new product liability cap specifically for asbestos cases. Section 3011 would allow a plaintiff to recover non-economic damages in a mesothelioma case of \$500,000.00 or 3 times the amount of economic damages, whichever is greater. If Section 3011 of HB5851 was adopted as written, a recent case would have had a non-economic cap of up to \$3,000,000.00. The potential increase of non-economic damages from \$683,500.00 to \$3,000,000.00 clearly would increase plaintiff's evaluation of the case.

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Any alleged savings from cases that are removed from the system because due to weak medical evidence will be cancelled by higher demands on the remaining cases due to an increased cap on non-economic damages.

Liability Issues: Manufacturer, Component Part Manufacturer, Supplier and Premises Owner

Michigan law requires that a manufacturer must adequately warn of dangers it knows of or had reason to know of at the time its product is being used. In this respect, the manufacturer is held to the knowledge of an expert and is presumed to know of scientific studies and articles concerning the safety of its products. *May v. Parke Davis & Co.*, 142 Mich App 404, 411 (1985).

In the 1970s, 1980s and 1990s, most of the defendants in the asbestos litigation were companies that manufactured asbestos-containing pipe-covering, block insulation, cement, refractory products, gaskets and/or packing. For example, some asbestos-containing pipe-covering mixed 85% calcium silicate and 15% asbestos to make their product. Also, asbestos-containing gaskets mixed between 65% to 85% asbestos and 35% to 15% other material. The theory was that the asbestos worked as a binding agent as well as helped the heat properties of the product. These were known as the "first tier" or "target defendants".

In the late 1990s and early 2000s, as the "target defendants" started to file for bankruptcy protection, the plaintiff's attorneys developed a "second tier" of new defendants. These "second tier" defendants did not manufacture asbestos-containing pipe-covering, block insulation, gaskets or packing. Instead, these "second tier" defendants incorporated asbestos-containing pipe-covering, block insulation, gaskets or packing into their product and sold their product with the gasket or packing. The best example of a "second tier" defendant is a pump manufacturer who may have sold their pump with an asbestos-containing gasket for use at the inlet and outlet of the pump. Under present Michigan law, that pump manufacturer is held to same standards of presumed knowledge and ability to warn of hazards as the "first tier" gasket manufacturer. One could argue that the component part manufacturer or "second tier" defendant should be treated differently than the first tier defendant.

One issue that Michigan shares with the national asbestos crisis concerns the treatment of premises owner. Premises owners are being sued in Michigan if workers came on to their property and worked with asbestos products while on the premises. For example, an outside contractor pipefitter who worked at a General Motors facility in Saginaw, Michigan would name General Motors as a defendant along with numerous manufacturers of gaskets, packing, pumps, valve, pipe-covering and block insulation defendants. This is possible since the worker was not employed by General Motors and the Workers Compensation bar does not apply. Unfortunately, these premises defendants have the least protection since the claim against them falls under general

negligence and not products liability law. Accordingly, these premises defendants are not protected by even the existing products liability caps on non-economic damages. Therefore, plaintiff's settlement demands as to these premises defendants are even higher than those issued to "first tier" and "second tier" defendants.

To illustrate, our office presently represents a Wayne County Hospital who is being sued by a fireman who allegedly inspected boilers for the Detroit Fire Department at the hospital. This gentlemen may have had minutes of contact in the boiler room at the hospital. The claim against the hospital is that the hospital did not warn him about the hazards associated with being exposed to asbestos. However, prior to his work on the fire department, he worked as a laborer and boilermaker installing and cleaning-up asbestos-containing pipe-covering and gaskets on a daily basis. Those manufacturers have the protection of tort reform caps while the hospital has no protection. Once again, one could argue that this is clearly unfair to the premises owner.

Another problem that Michigan as well as the nation faces in the asbestos crisis is the treatment of suppliers of asbestos-containing products. The representatives from Harrison Piping testified on April 25, 2006 that they merely sold asbestos-containing gaskets to commercial buyers. The allegation in the complaint against Harrison Piping, as well as all other suppliers, is that they supplied an asbestos-containing product and failed to provide any warnings to the user of the product. They "implied" that they products they sold were safe for normal use and foreseeable use of the product. At the present time, there is confusion at the trial court level regarding the duty of the supplier. Section 3015(1)(A) of House Bill 5851 states that a seller other than a manufacturer is liable to the plaintiff if (1) the seller sold the product, (2) the product seller failed to exercise reasonable care and (3) the failure was a proximate cause of the harm. The bill continues in Section 3015(2) to state that reasonable care must provide the seller with a reasonable opportunity to inspect the product. Unfortunately, this leaves the question of a seller's liability as a question of fact for jury and exposes them to continued disproportionate liability.

The problem identified by Harrison Piping as well as all other suppliers would be solved if House Bill 5851 eliminated Section 3015(1)(A) and required Section 3015(1)(B) or (C) to prove liability against the seller who was a non-manufacturer.

Conclusion

There is a national asbestos crisis brought on by many different factors. As demonstrated above, Michigan has not contributed to this problem by enacting fair venue statutes, several liability and caps to non-economic damages. Could Michigan do better? Yes. Michigan has the opportunity to pass legislation to protect suppliers and premises owners. Michigan can keep its effective caps on non-economic damages that are reasonable. Michigan can maintain its strong venue rules. At this time, Michigan is being asked to follow the trend and adopt a generalized national solution. I

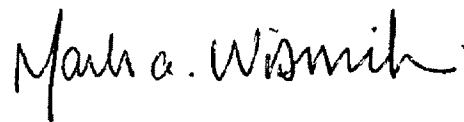
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would suggest that Michigan not be a follower but rather a continued leader. Michigan
be can be a shinning example of how Tort Reform can provide protection and fairness
to all parties.

Thank you again for this opportunity to comment on this critical legislation.

For the Firm,

KITCH DRUTCHAS WAGNER
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A handwritten signature in black ink that reads "Mark A. Wisniewski". The signature is written in a cursive, flowing style.

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